

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

On October 1, 2015, Allen Keith Crenshaw (“Petitioner”) filed a document titled “Notice of Motion and Martinez Motion for Review in the First Instance,” which the Court construes as a petition for writ of habeas corpus by a person in state custody (“Petition”), pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1999 conviction in San Bernardino County Superior Court Case No. FSB20129. (See Petition at 15-16 and Exhibits to Memorandum of Points and Authorities in Support of Martinez Motion.)¹

PROCEDURAL BACKGROUND

Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of the records in Petitioner's prior federal habeas corpus action in this Court, Allen Keith Crenshaw v. Timothy E. Busby, Case No. EDCV 10-1672-GAF (JEM) ("Crenshaw I"). See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own

¹ Petitioner's Request for Judicial Notice is granted.

1 records in other cases, as well as the records of an inferior court in other cases.") (citations
 2 omitted); accord United States v. Howard, 381 F.3d 873, 876 n. 1 (9th Cir. 2004).

3 On October 29, 2010, in Crenshaw I, Petitioner filed a petition for a writ of habeas
 4 corpus pursuant to 28 U.S.C. § 2254. Petitioner challenged his 1999 conviction in San
 5 Bernardino County Superior Court Case No. FSB20129. (Crenshaw I, Dkt. No. 1.) On
 6 February 23, 2011, the Magistrate Judge issued a Report and Recommendation,
 7 recommending that Crenshaw I be dismissed with prejudice as untimely. (Id., Dkt. No. 13.)
 8 On May 5, 2011, the Court issued an Order Adopting Findings, Conclusions, and
 9 Recommendations of United States Magistrate Judge, an Order Denying Certificate of
 10 Appealability, and a Judgment dismissing the action with prejudice. (Id., Dkt. Nos. 17-19.) On
 11 June 8, 2011, Petitioner filed a Notice of Appeal. (Id., Dkt. No. 20.) On August 27, 2012, the
 12 Ninth Circuit denied Petitioner's request for a certificate of appealability. (Id., Dkt. No. 23.)

13 On October 1, 2015, Petitioner filed the instant Petition, in which he challenges the
 14 same 1999 conviction at issue in Crenshaw I.

DISCUSSION

16 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in
 17 pertinent part:

18 (b)(1) A claim presented in a second or successive habeas corpus
 19 application under section 2254 that was presented in a prior application
 20 shall be dismissed.

21 (2) A claim presented in a second or successive habeas corpus
 22 application under section 2254 that was not presented in a prior
 23 application shall be dismissed unless –

24 (A) the applicant shows that the claim relies on a new rule of
 25 constitutional law, made retroactive to cases on collateral review by
 26 the Supreme Court, that was previously unavailable; or

27 (B)(i) the factual predicate for the claim could not have been
 28 discovered previously through the exercise of due diligence; and [¶]

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b)(1)-(3)(A); see also Rule 9 of the Rules Governing § 2254 Cases in the United States District Courts. “[D]ismissal of a habeas petition as untimely constitutes a disposition on the merits and [] a further petition challenging the same conviction would be ‘second or successive’ for purposes of 28 U.S.C. § 2244(b).” McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

A district court does not have jurisdiction to consider a second or successive petition absent authorization from the court of appeals. Burton v. Stewart, 549 U.S. 147, 152 (2007) (per curiam); see also Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) (per curiam) (“When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application.”) (citation and quotation marks omitted).

The instant Petition is a second or successive petition challenging the same conviction imposed by the same judgment of the state court at issue in Crenshaw I, which was adjudicated on the merits. See McNabb, 576 F.3d at 1029. There is no indication in the record that Petitioner has obtained permission from the Ninth Circuit Court of Appeals to file a second or successive petition. This Court, therefore, lacks jurisdiction over the Petition under 28 U.S.C. § 2244(b)(3). See Burton, 549 U.S. at 152.

Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts provides that if it plainly appears from the face of the petition and any exhibits annexed to it

1 that the Petitioner is not entitled to relief in the district court, the judge shall summarily dismiss
 2 the petition. Here, summary dismissal is warranted.

3 Accordingly, the Court will dismiss the Petition without prejudice to Petitioner filing a
 4 new action if and when he obtains permission from the Ninth Circuit to file a successive
 5 petition.²

6 **CERTIFICATE OF APPEALABILITY**

7 Under the AEDPA, a state prisoner seeking to appeal a district court's final order in a
 8 habeas corpus proceeding must obtain a Certificate of Appealability ("COA") from the district
 9 judge or a circuit judge. 28 U.S.C. § 2253(c)(1)(A). A COA may issue "only if the applicant
 10 has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2);
 11 accord *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). "A petitioner satisfies this
 12 standard by demonstrating that jurists of reason could disagree with the district court's
 13 resolution of his constitutional claims or that jurists could conclude the issues presented are
 14 adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322,
 15 327 (2003); see also *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

16 When a district court dismisses a petition on procedural grounds, the reviewing court
 17 should apply a two-step analysis, and a COA should issue if the petitioner can show both: (1)
 18 "that jurists of reason would find it debatable whether the district court was correct in its
 19 procedural ruling[;]" and (2) "that jurists of reason would find it debatable whether the petition
 20 states a valid claim of the denial of a constitutional right[.]" *Slack*, 529 U.S. at 478.

21 The Court is dismissing the Petition without prejudice because it is a second or
 22 successive petition. Since the Petition is clearly a second or successive petition, Petitioner
 23 cannot make the requisite showing "that jurists of reason would find it debatable whether the
 24 district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478.

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 26
 27 ² If Petitioner obtains permission to file a second petition, he should file a new petition for writ
 28 of habeas corpus. He should not file an amended petition in this action or use the case number
 from this action because the instant action is being closed today. When Petitioner files a new
 petition, the Court will give the petition a new case number.

1 ORDER
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3 Based on the foregoing, IT IS ORDERED THAT:

- 4 1. The Petition is **dismissed without prejudice** for lack of jurisdiction;
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6 2. A certificate of appealability is **denied**.

7 DATED: 10/16/15

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Dale S. Fischer

DALE S. FISCHER
UNITED STATES DISTRICT JUDGE